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## I. BACKGROUND

### A. Procedural Background

Plaintiffs Bhupinder Rai, Oscar Martinez, and Aaron Cervantes ("Plaintiffs") filed their Complaint as a class action in the California Superior Court for the County of Los Angeles on July 6, 2012. Plaintiffs filed the First Amended Complaint ("FAC") on September 10, 2012. (Not. of Removal, Ex. A, Doc. No. 1.) Defendants CVS Pharmacy, Inc. and CVS Caremark Corporation ("Defendants" or "CVS") removed the action to this Court on October 11, 2012. (Id.) On April 9, 2013, Plaintiffs filed a Second Amended Complaint ("SAC"). (Doc. No. 18.) On June 12, 2013, Plaintiffs filed a Third Amended Complaint ("TAC") alleging claims for: 1) denial of meal periods (Cal. Labor Code §§ 226.7, 512); 2) denial of rest periods (Cal. Labor Code. § 226.7); 3) unlawful business practices (Cal Bus & Prof. Code §§ 17200, *et seq.*; and 4) recovery of penalties by private attorney general (Cal. Labor Code §§ 2699, *et seq.*). (Doc. No. 28.)

On August 9, 2013, Plaintiffs filed a Motion to Certify Class ("Motion," Doc. No. 32), attaching the Declaration of Jeff Geraci ("Geraci Decl.," Doc. No.

33) attesting to Exhibits 1-21,<sup>1</sup> and Compendium of Class Member Declarations (Doc. No. 34).<sup>2</sup> In the Motion, Plaintiffs invoke Federal Rule of Civil Procedure 23(a) and 23(b)(3), and ask the Court to certify a Plaintiff Class for their claims for failure to provide meal periods, failure to provide rest periods, and violation of the UCL, composed of:

All persons currently or formerly employed by CVS in California as a Supervisor or Assistant

<sup>1</sup> Defendants object to Plaintiffs' Exhibits 6-8, 11, 14, 16, 17, and 21 as lacking in foundation, not properly authenticated, and hearsay. (Defs.' Objections to Evidence, Doc. No. 41.) All these exhibits are "[A] motion for class certification ... need not be supported by admissible evidence." Parkinson v. Hyundai Motor Am., 258 F.R.D. 580, 599 (C.D. Cal. 2008); Cholakyan v. Mercedes-Benz, USA, LLC, 281 F.R.D. 534, 550 (C.D. Cal. 2012) ("Because evidentiary rules unrelated to expert testimony are not applied with rigor in deciding motions for class certification, all authentication and lack of foundation objections are overruled."). "This is because at the class certification stage, the Court makes no findings of fact, nor any ultimate conclusions on Plaintiffs' claims . . . ." Velazquez v. Costco Wholesale Corp., No. 11-00508, 2011 WL 4891027, at \*2 (C.D. Cal. Oct. 11, 2011). The Court ~~OVERRULES~~ Defendants' objections.

<sup>2</sup> Plaintiffs filed a Request for Judicial Notice, requesting the Court take judicial notice of the Motion for Preliminary Approval of Class Action Settlement in Soto v. CVS Caremark Corporation, Superior Court of California, County of Los Angeles, Case No. BC468650. (Doc. No. 35.) The Court may take judicial notice of the existence of court filings and another court's orders, although the Court may not accept as true the facts found or alleged in such documents. See Peel v. BrooksAmerica Mortg. Co., 788 F. Supp. 2d 1149, 1158 (C.D. Cal. 2011) (citing Wyatt v. Terhune, 315 F.3d 1108, 1114 (9th Cir. 2003)). Accordingly, the Court takes judicial notice of this court filing.

1 Manager, or equivalent positions, at any time  
2 from July 6, 2008 to May 19, 2013 who worked a  
3 shift of at least 3.5 continuous hours as the  
4 sole employee with keys and authority to perform  
5 each of the following functions: open a store,  
its cash registers, safes, drop boxes, change  
drawers, and offices.

6 (Mot. at 10.) Plaintiffs also request certification of  
7 three subclasses:

8  
9 Meal Period Subclass: All members of the  
10 Plaintiff Class who were not provided an  
11 uninterrupted, duty-free meal period of not less  
12 than 30 minutes, for approximately every five (5)  
13 hours of work, and were not paid one (1) hour of  
14 pay at the employee's regular rate of pay for  
each late, missed, interrupted, or non-duty free  
meal period in lieu thereof[;]

15 Rest Period Subclass: All members of the  
16 Plaintiff Class who were not authorized and  
17 permitted, an uninterrupted, duty-free ten (10)  
18 minute net rest period per four (4) hours worked  
19 or major fraction thereof in any work period, and  
20 were not paid one (1) hour of pay at the  
employee's regular rate of pay for each missed,  
late, interrupted[, ] or non-duty free rest period  
in lieu thereof[; and]

21 17200 Subclass: All members of the Plaintiff  
22 Class who were subjected to Defendants[']  
23 unlawful, unfair or fraudulent business acts or  
24 practices in the form of Labor Code and Wage  
Order violations regarding Rest Periods and/or  
Meal Periods.

25 (Id.)  
26  
27  
28

1 Defendants opposed the Motion on August 30, 2013  
2 (Doc. No. 40), attaching the Declaration of Lee Stanley  
3 ("Stanley Decl.," Doc. No. 42-1), attesting to Exhibits  
4 A-L; the Declaration of J. Chris Brown ("Brown Decl.,"  
5 Doc. No. 42-2), attesting to Exhibits M-N; the  
6 Declaration of Jessica Durand ("Durand Decl.," Doc. No.,  
7 42-3; the Declaration of Paul Handley ("Handley Decl.,"  
8 Doc. No. 42-4; the Declaration of Jennifer Zargarof  
9 ("Zargarof Decl.," Doc. No. 42-5), attesting to  
10 exhibits O-R; and Declarations of Putative Class  
11 Members and Store Witnesses (Doc. No. 42-6).

12 Plaintiff replied on September 13, 2013 (Doc. No.  
13 43), attaching the Declaration of Jeff Geraci ("Geraci  
14 Decl. iso Reply," Doc. No. 43-1).

15 On September 20, 2013, Defendants filed an Ex Parte  
16 Application for Leave to File a Sur-Reply, attaching  
17 the Proposed Sur-Reply.<sup>3</sup> (Doc. Nos. 44, 44-2.)  
18 Plaintiffs opposed the Ex Parte Application on  
19 September 23, 2013 (Doc. No. 45) and Defendants replied  
20 on September 25, 2013 (Doc. No. 46).

21  
22  
23 <sup>3</sup> Defendants request leave to file a sur-reply in  
24 order to respond to a "newly-articulated theory" in  
25 Plaintiffs' Reply. The Court declines to consider any  
26 arguments raised for the first time in a reply brief.  
27 See Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)  
28 (A "district court need not consider arguments raised  
for the first time in a reply brief.") Thus,  
Defendants' Ex Parte Application is DENIED as moot.

1  
2 **B. Background**

3  
4 Plaintiffs seek relief pursuant to California Labor  
5 Code § 226.7, which provides employees meal and rest  
6 periods established by an applicable Industrial Welfare  
7 Commission Wage Order, and California Labor Code § 512,  
8 which "requires a first meal period no later than the  
9 end of an employee's fifth hour of work, and a second  
10 meal period no later than the end of an employee's 10th  
11 hour of work." Brinker Rest. Corp. v. Sup. Ct., 53  
12 Cal. 4th 1004, 1041 (2012). An employer's obligation is  
13 to "provide a meal period to its employees" by offering  
14 a "reasonable opportunity to take an uninterrupted 30-  
15 minute break, and does not impede or discourage them  
16 from doing so." Id. at 1040. An employer does not  
17 need to ensure that an employee do no work during an  
18 off-duty meal period. Id. However, "an employer's  
19 provision of an additional hour of pay does not excuse  
20 a section 226.7 violation. The failure to provide  
21 required meal and rest breaks is what triggers a  
22 violation of section 226.7." Kirby v. Immoos Fire  
23 Protection, Inc., 53 Cal. 4th 1244, 1256-57 (2012).

24 1. Plaintiff's Allegations

25  
26 Plaintiff Rai was employed as an Assistant Manager  
27 at the Long Beach CVS store from May 2011 - October  
28

1 2012, Plaintiff Cervantes was employed as a Shift  
2 Supervisor in several Los Angeles stores from June 2006  
3 - August 2009, and Plaintiff Oscar Martinez was  
4 employed as a Shift Supervisor in several Los Angeles  
5 stores from 2006 - November 2010. (Geraci Decl., Exhs.  
6 1-3.) Plaintiffs allege that during the relevant  
7 period it was the policy and practice of CVS to staff  
8 its stores such that non-exempt Supervisors and  
9 Assistant Managers were routinely required to attend to  
10 business when they would otherwise be on a rest or meal  
11 break, and were regularly not permitted to take a rest  
12 and/or meal period. (TAC ¶ 20.)

13 The operation of each store during the class period  
14 required keys, keypad codes, and key tags in order to  
15 perform essential duties, such as: opening and closing  
16 the store, opening safe and change drawers to issue  
17 money for cash registers, and perform overrides. (Mot.  
18 at 4.) Plaintiffs argue that CVS only authorized  
19 management employees to use these codes, tags, and  
20 keys, and strictly prohibited sharing the store keys  
21 and tags. (Id. at 5.) Plaintiffs further contend that  
22 until May 20, 2013, CVS uniformly required at least one  
23 "key carrier" employee to open and remain in stores  
24 until closing and the "key carrier" duties were  
25 required to be performed throughout each shift. (Mot.  
26 at 3-5.) They claim that compensation is owed for non-  
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1 compliant rest and meal periods "based on a uniform  
2 company policy of not relieving Managers of 'key  
3 carrier' duties and requiring Managers to remain on  
4 premises during breaks, when they are the sole 'key  
5 carrier' on duty." (Id. at 1.)

## 6 7 2. CVS Meal and Rest Period Policies

8  
9 The Parties do not appear to dispute that CVS's  
10 formal meal and break policies were compliant during  
11 the class period. Throughout the relevant time period,  
12 CVS had the following policies, applicable to all  
13 California non-exempt employees:

14  
15 Meal Periods: Non-exempt employees who work 5  
16 hours in a shift are entitled to an unpaid,  
17 uninterrupted off-duty meal of at least 30  
18 minutes, which must begin before the 5th hour  
19 of work. Employees who work more than 10 hours  
20 during a shift are entitled to a second off-  
21 duty 30 minute meal break beginning no later  
22 than 5 hour after the end of the first meal  
23 break. Employees may leave the store during a  
24 meal break. Employees may voluntarily waive  
25 the first meal period for shifts in which they  
26 work up to 6 hours, and they may waive the



1 second meal period if they work no more than 12  
2 hours and took the first meal break in a timely  
3 manner. If an employee's shift is more than 6  
4 hours, he may not waive the first meal break,  
5 and if an employee's shift is more than 12  
6 hours, he may not waive the second break.  
7 Employees can waive their meal period by  
8 informing the store manager or electing a  
9 wavier through SMART with the manager present.  
10 (Stanley Decl., Ex. A.)  
11

12 Rest Periods: Employees are authorized to take  
13 a paid 10-minute rest break during each 4 hours  
14 or major fraction of 4 hours. No break is  
15 required if the employee's total daily work  
16 time is less than 3.5 hours. Employees who  
17 work shifts of 6-10 hours are permitted to take  
18 two paid 10 minute breaks. (Id.)  
19

20 Meal Period and Rest Period Premium Programs:  
21 In April 2008, CVS implemented a program in all  
22 its California retail stores to automatically  
23 pay a Meal Period Premium ("MPP"), equal to one  
24 hour of pay, any time a non-exempt employee did  
25 not record a meal period compliant with CVS's  
26 policies, limited to one per employee per  
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1 shift. (Brown Decl. ¶ 3, Ex. M.) A Rest  
2 Period Premium is paid to employees who are not  
3 authorized and permitted to take a minimum 10  
4 minute rest period as directed by CVS's policy.  
5 RPPs are limited to one per employee per shift,  
6 and must be entered manually by the Store  
7 Manager. (Id.)  
8

9 3. CVS Delegation Policy  
10

11 In March 2013, CVS implemented a program in which  
12 non-exempt managers and supervisors could delegate  
13 approval authority to a clerk prior to punching out and  
14 leaving for a meal period. (See Geraci Decl., Ex. 6.)  
15 The management functions managers and supervisors can  
16 delegate include: approvals related to voids and  
17 refunds, override functions, price modifications, and  
18 keyed credit cards. Additionally, the policy outlines  
19 that clerks will have access to the change box or  
20 change drawer to make change for large bills. (Id.)  
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## II. LEGAL STANDARD<sup>4</sup>

Federal Rule of Civil Procedure 23 governs class actions. Fed. R. Civ. P. 23. A party seeking class certification must demonstrate the following prerequisites: "(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named plaintiff's claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citing Fed. R. Civ. P. 23(a)). The party may not rest on mere allegations, but must provide facts to satisfy these requirements. Doninger v. Pac. Northwest Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977) (citing Gillibeau v. City of Richmond, 417 F.2d 426, 432 (9th Cir. 1969)).

In addition to these prerequisites, a plaintiff must satisfy one of the three categories set out in Rule 23(b) in order to maintain a class action. Where, as here, a plaintiff moves for class certification under Rule 23(b)(3), a class must satisfy two conditions: (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) "a class action is

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<sup>4</sup> Unless otherwise noted, all references to "Rule" refer to the Federal Rules of Civil Procedure.

1 superior to other available methods for fairly and  
2 efficiently adjudicating the controversy." Fed. R. Civ.  
3 P. 23(b)(3). The party seeking class certification  
4 bears the burden of demonstrating that it has met each  
5 of the four requirements of Rule 23(a) and at least one  
6 of the Rule 23(b) requirements. Zinser v. Accufix  
7 Research Inst., 253 F.3d 1180, 1186 (9th Cir. 2001).  
8 To meet its burden, the moving party "'must provide  
9 facts to satisfy these requirements; simply repeating  
10 the language of the rules . . . is insufficient.'" In  
11 re Paxil Litig., 212 F.R.D. 539, 543 (C.D. Cal. 2003)  
12 (quoting Bates v. United Parcel Serv., 204 F.R.D. 440,  
13 443 (N.D. Cal. 2001)) (ellipsis in original).

14 "The decision to grant or deny a motion for class  
15 certification is within the trial court's discretion."  
16 Bateman v. American Multi-Cinema, Inc., 623 F.3d 708,  
17 712 (9th Cir. 2010). A class certification motion  
18 requires a district court to conduct a "rigorous  
19 analysis" that frequently "will entail some overlap  
20 with the merits of the plaintiff's underlying claim.  
21 Wall-Mart Stores, Inc., v. Dukes, 131 S.Ct. 2541, 2550  
22 (2011). However, neither "the possibility that a  
23 plaintiff will be unable to prove his allegations, nor  
24 the possibility that the later course of the suit might  
25 unforeseeably prove the original decision to certify  
26 the class wrong, is a basis for declining to certify a  
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1 class which apparently satisfies [Rule 23]." United  
2 Steel Workers v. ConocoPhillips Co., 593 F.3d 802, 809  
3 (9th Cir. 2010).

### 6 **III. DISCUSSION**

#### 7 **A. Ascertainability**

9 "In addition to the explicit requirements of Rule  
10 23, an implied prerequisite to class certification is  
11 that the class must be sufficiently definite; the party  
12 seeking certification must demonstrate that an  
13 identifiable and ascertainable class exists." Xavier  
14 v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089  
15 (N.D. Cal. 2011); see also Thomas & Thomas Rodmakers,  
16 Inc. v. Newport Adhesives & Composites, Inc., 209  
17 F.R.D. 159, 163 (C.D. Cal. 2002) ("Once an  
18 ascertainable and identifiable class has been defined,  
19 plaintiffs must show that they meet the four  
20 requirements of Rule 23(a), and the two requirements of  
21 Rule 23(b)(3)."). "Courts have held that the class  
22 must be adequately defined and clearly ascertainable  
23 before a class action may proceed." Schwartz v. Upper  
24 Deck Co., 183 F.R.D. 672, 679-80 (S.D. Cal. 1999). The  
25 class definition must allow future courts to determine  
26 who was and was not bound by the judgment. Deitz v.

1 Comcast Corp., No. 06-06352, 2007 WL 2015440, at \*8  
2 (N.D. Cal. July 11, 2007).

3 CVS argues that Plaintiffs' proposed class is not  
4 ascertainable as the time records retained by CVS do  
5 not show who was a "sole key carrier" at any given time  
6 because: 1) the time records do not show all employees  
7 present at a particular time (e.g., loaned employees  
8 and salaried store managers) and 2) some employees,  
9 other than putative class members, such as pharmacists,  
10 have override authority or have keys, but this  
11 authority is not recorded on time records. (Opp. at  
12 13-15.) Plaintiffs respond that the CVS policy  
13 requires all employees, exempt and non-exempt, to be  
14 listed on the store schedule. (Reply at 7.)  
15 Additionally, Plaintiffs contend that even if a  
16 pharmacist, beauty department manager, or home health  
17 manager could perform key carrier duties, this would  
18 not make the class unascertainable because these other  
19 positions are listed on the store schedule and CVS's  
20 time records would still show when Supervisors and  
21 Assistant Managers served as sole key carriers. (Id.)

22 Plaintiffs have not pointed to any evidence that  
23 CVS required store managers to be entered onto the  
24 store schedule, and Defendants have presented evidence  
25 that store managers do not always put themselves on the  
26 schedule or do not work the hours they put on the  
27

1 schedule (see e.g., Dagnino Decl. ¶ 3; Ledger Decl. ¶  
2 6). Additionally, it appears that the individuals with  
3 the ability to carry out "key carrier" duties varies  
4 from store to store; Plaintiffs have not identified a  
5 CVS policy which provides keys for broad categories of  
6 employees, and the evidence before the Court suggests  
7 otherwise. For example, one Beauty Department Manager  
8 at Store 9674 does not have her own card for overrides  
9 or a set of keys (Del Junco Decl. ¶ 3), while a Beauty  
10 Department Manager at Store 9480 has override abilities  
11 and various keys and combinations used throughout the  
12 store (David Decl. ¶ 3). (See also Garcha Decl. ¶ 7  
13 (Beauty Department Manager has receiving, change  
14 drawer, and fragrance cabinet keys, but no override  
15 keys); Bryant Decl. ¶ 5 (clerk/cashier has had override  
16 abilities since August 2012); Ciocho Decl. ¶ 6 (Head  
17 Cashier has own override card and set of keys for most  
18 duties).) Because of the variety of responsibilities  
19 and keys even within job descriptions, the Court agrees  
20 with Defendants that the proposed class is not  
21 sufficiently ascertainable from CVS's records.

22 "A lack of ascertainability alone will general not  
23 scuttle class certification." Red v. Kraft Foods, No.  
24 10-1028, 2012 WL 8019257, at \*6 (C.D. Cal. April 12,  
25 2012). Thus, the Court assesses whether the Rule 23  
26 factors have been met.

1       **B. Federal Rule of Civil Procedure 23(a)**

2           **1. Numerosity**

3  
4       In determining whether under Rule 23(a)(1) joinder  
5 of all members is "impracticable," courts have held  
6 that the plaintiff need not show that it would be  
7 "impossible" to join every class member. Haley v.  
8 Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal 1996).  
9 Additionally, there is no particular number cut-off, as  
10 the specific facts of each case may be examined.  
11 Ballard v. Equifax Check Servs., Inc., 186 F.R.D. 589,  
12 594 (E.D. Cal. 1999). Courts have not required  
13 evidence of specific class size or identity of class  
14 members to satisfy the requirements of Rule 23(a)(4).  
15 Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993).

16       Plaintiffs argue that the proposed class consists  
17 of over 7,500 managers. (Mot. at 10-11.) Defendant  
18 does not contest numerosity. (Opp. at 11 fn. 5.)

19       Thus, the Court finds that the numerosity  
20 requirement is satisfied.

21           **2. Commonality**

22  
23       Courts have construed Rule 23(a)(2)'s commonality  
24 requirement permissively. Staton v. Boeing Co., 327  
25 F.3d 938, 953 (9th Cir. 2003). "All questions of fact  
26 and law need not be common to satisfy the rule. The  
27  
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1 existence of shared legal issues with divergent factual  
2 predicates is sufficient, as is a common core of  
3 salient facts coupled with disparate legal remedies  
4 within the class." Id. (quoting Hanlon v. Chrysler  
5 Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)); see also  
6 Haley, 169 F.R.D. at 648 ("[F]or the commonality  
7 requirement to be met, there must only be one single  
8 issue common to the proposed class.").

9 Plaintiffs contend that the commonality requirement  
10 is satisfied because the claims of the proposed class  
11 members turn on a single legal issue of whether, under  
12 CVS's policy, CVS could provide managers lawful meal  
13 and rest periods when they worked as sole key carriers.  
14 (Mot. at 12.)

15 Defendants argue that Plaintiffs' proposed class  
16 does not meet the commonality requirement for several  
17 reasons. First, the proof required to prove or defend  
18 Plaintiffs' claims requires individualized inquiries as  
19 to why each employee did not take a meal break on a  
20 given occasion since, under California law, employers  
21 only need to provide the opportunity to take meal and  
22 rest breaks, or compensate employees for denied meal  
23 periods and rest breaks, not ensure that the employees  
24 take them. (Opp. at 16-17.) Second, CVS has a policy  
25 of automatically paying meal period premiums for missed  
26 meal breaks, and Assistant Store Managers and  
27  
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1 Supervisors had the ability to assign themselves rest  
2 period premiums, which were regularly paid. (Opp. at  
3 17-18.) Third, Plaintiffs have not offered proof of a  
4 "key carrier" policy that required a "key carrier" to  
5 be in the store during all business hours. (Opp. at  
6 19-20.) Finally, Plaintiffs' theory of understaffing  
7 and customer service concerns requires an individual  
8 inquiry into each store, shift, and employee. (Opp. at  
9 20-21.)

10 Plaintiffs allege a specific unlawful practice,  
11 which applied to Assistant Managers and Supervisors  
12 statewide. There are common questions of law and fact  
13 here, including: 1) whether CVS had a policy requiring  
14 Assistant Managers and Supervisors to stay in the store  
15 when there were no other "key carriers" working; and 2)  
16 whether any such policy violated CVS's obligation to  
17 provide off-duty meal and rest breaks, as required by  
18 California law. Thus, the Court finds that the  
19 commonality requirement is met. Defendants'  
20 commonality arguments are addressed below in the  
21 discussion regarding the question of predominance. See  
22 Shulz v. QualxServ, LLC, Nos. 09-17, 09-2081, 2012 WL  
23 1439066, at \*5 (S.D. Cal. April 26, 2012)("Rule  
24 23(a)(2) can be satisfied by even a single common  
25 question, but 23(b)(3) requires convincing proof that  
26 the common questions 'predominate.'" ) (citing Amchem  
27

1 Products, Inc. v. Windsor, 521 U.S. 591 at 623-24;  
2 Hanlon, 150 F.3d at 1022); Purnell v. Sunrise Senior  
3 Living Mgmt., Inc., No. 10-897, 2012 WL 1951487, at \*2  
4 (C.D. Cal. Feb 27, 2012).

### 5 6 **3. Typicality and Adequacy of Representation**

7  
8 In order for a court to find typicality, "a class  
9 representative must be part of the class" and "possess  
10 the same interest and suffer the same injury" as the  
11 members of the class. General Telephone Co. of  
12 Southwest v. Falcon, 457 U.S. 147, 157 (1982) (internal  
13 citations omitted). To gauge typicality, a "court does  
14 not need to find that the claims of the purported class  
15 representative are identical to the claims of the other  
16 class members." Haley, 169 F.R.D. at 649.

17 Plaintiffs assert that their claims are typical  
18 because they all served as non-exempt Managers, subject  
19 to the same "key carrier," meal, and rest period  
20 policies as the putative class, during the class  
21 period. (Mot. at 13.) Because Plaintiffs claim to  
22 have missed meal and rest breaks because of CVS  
23 policies, the nature of Plaintiffs' claims are typical  
24 of those of the putative class members. Defendants do  
25 not argue otherwise. Thus, the Court finds that the  
26 typicality requirement has been met.

#### 4. Adequacy of Representation

Traditionally, courts have engaged in a two-part analysis to determine if plaintiffs meet the requirements of Rule 23(a)(4). First, the class representatives must not have interests antagonistic to the unnamed class members. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). Second, the representatives must be able to prosecute the action "vigorously through qualified counsel." Id. The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997) (citations omitted).

Without providing any authority, Defendants only cursorily state in a footnote that because Plaintiffs Cervantes and Rai were allegedly terminated because of inappropriate behavior, resulting in litigation, "and the issues described throughout [the Opposition] with all three Plaintiffs, they would be inadequate representatives for any class . . . ." (Opp. at 7 fn. 6.) Based on the record currently before the Court, the Court cannot conclude that there is a conflict of interest between Plaintiffs and the putative class members, or that the proposed representatives are unfamiliar with the factual basis for the claims.

1 Additionally, Defendants do not dispute that  
2 Plaintiffs' attorneys have any conflict or deficiency  
3 that would make them inadequate counsel.

4 Thus, the Court finds that adequacy requirement has  
5 been met.

6  
7 **C. Federal Rule of Civil Procedure 23(b)(3)**

8  
9 A plaintiff seeking to certify a class under Rule  
10 23(b)(3) must show that questions of law or fact common  
11 to the members of the class "predominate over any  
12 questions affecting only individual members and that a  
13 class action is superior to other available methods for  
14 the fair and efficient adjudication of the  
15 controversy." Fed. R. Civ. P. 23(b)(3).

16  
17 **1. Predominance**

18  
19 Rule 23(b)'s requirement that common issues of law  
20 or fact predominate over individual issues is similar  
21 to, but more stringent than, Rule 23(a)'s commonality  
22 requirement. In re Countrywide Financial Corp  
23 Securities Litigation, 273 F.R.D. 586, 596 (C.D. Cal.  
24 2009) (quoting Amchem Products, 521 U.S. at 609). The  
25 focus in the predominance inquiry is "whether proposed  
26 classes are sufficiently cohesive to warrant  
27 adjudication by representation" and "the relationship

1 between the common and individual issues." In re Wells  
2 Fargo Home Mortg. Overtime Pay Litigation, 571 F.3d  
3 953, 957 (9th Cir. 2009)(quoting Local Joint Executive  
4 Bd. of Culinary/Bartender Trust Fund v. Law Vegas  
5 Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001);  
6 Hanlon, 150 F.3d at 1022 (9th Cir. 1998)).

7 Plaintiffs offer no evidence that Defendants  
8 imposed a standardized policy across the California  
9 stores requiring, other than the identical, conclusory  
10 statements in former employees' declarations that they  
11 were "not allowed to leave CVS premises during any rest  
12 or meal break when [they] were the sole Manager or  
13 Supervisor on duty . . . . [and were] trained and told  
14 by CVS Management that it was CVS policy that when  
15 there was no other Manager or Supervisor on Duty,  
16 [they] could not leave the premises at any time" and  
17 the fact that CVS implemented the delegation policy.  
18 (See Compendium; Reply at 9.) However, Defendants  
19 provide evidence to the contrary. Declarations of  
20 current employees show that some non-managers and non-  
21 supervisors had the ability to perform at least some of  
22 the "key carrier" duties, even before the delegation  
23 policy was implemented. (See e.g., Alcantar Decl. (had  
24 full override authority as a head cashier beginning in  
25 April 2012); Bryant Decl. (given override ability as  
26 clerk/cashier starting in August 2012); Ledger Decl. ¶

1 9 (pharmacists in store 8858 can do system overrides  
2 and take out change from box).) This allowed Shift  
3 Supervisors and Assistant Managers to leave for an off-  
4 duty break, even when he or she is the only supervisor  
5 working at the time. For example, a head cashier at  
6 store 9253 has her own override card as well as her own  
7 set of keys for most duties that require keys at the  
8 store. Although she cannot receive delivery trucks,  
9 she has told delivery drivers to wait or return later  
10 if they arrive when the manager or supervisor on-duty  
11 was on a break. (Ciocho Decl. ¶ 6; see also Rider  
12 Decl. ¶ 6 (shift supervisor has left his cell phone  
13 number when he wanted to leave the premises during a  
14 break).)

15 Additionally, the declarations Defendants provide  
16 reflect that it is rare for some Shift Supervisors and  
17 Assistant Managers to miss their meal or rest periods  
18 at all. (See generally Declarations of Putative Class  
19 Members and Store Witnesses.) However, Plaintiffs  
20 provide several declarations showing that some  
21 supervisors were expected to clock out during meal  
22 periods, but were required to remain in the store and  
23 be available to work. (See generally Compendium of  
24 Class Member Declarations.) This competing testimony  
25 is insufficient for the Court to find that CVS had a  
26 common practice or policy of denying putative class  
27  
28

1 members their meal and rest periods, and the Court  
2 cannot find that common issues predominate. See  
3 Ordonez v. Radio Shack, Inc., No. 10-7060, 2013 WL  
4 210223, at \*11 (C.D. Cal. Jan. 17, 2013) ("Because of  
5 the competing testimony before the Court, plaintiff's  
6 evidence that defendant *may* have an illegal, written  
7 rest break policy is insufficient for this Court to  
8 find that common issues predominate.") (emphasis in  
9 original); Jimenez v. Allstate Ins. Co., No. 10-8486,  
10 2012 WL 1366052, at \*15 (C.D. Cal. Apr. 18, 2012)  
11 ("[I]n the absence of a common practice or policy or  
12 some other 'glue' to bind this class, commonality  
13 cannot be shown.")

14 In the absence of common evidence that putative  
15 class members were regularly forced to work through  
16 meal and rest periods when no other manager or  
17 supervisor was on duty, the Court would need to make  
18 individual inquiries as to why individual missed meal  
19 periods. See Sultan v. Medtronic, Inc., No. 11-4132,  
20 2012 WL 3042212, at \*2 ("reasons that employees fail to  
21 take breaks can be manifold: the employee could have  
22 forgotten, wanted to finish assignments, were not  
23 hungry, did not want to leave the premises, wanted to  
24 leave early or, possibly, were manipulating their  
25 timecards"); see also Wren v. RGIS Inventory  
26 Specialists, 256 F.R.D. 180, 208-209 (N.D. Cal. 2009)



(finding the plaintiffs' meal break claims did not meet the requirement of Rule 23(b)(3) "in the absence of any explicit [employer policy] to which missed meals can be attributed and in light of the individualized inquiries necessary to evaluate the [employer practices] as to meal breaks"). Particularly in light of CVS's written policies and the fact that the ability of specific employees to carry out "key carrier" duties varies from employee to employee and store to store, the totality of the evidence demonstrates that adjudication of the putative class members' meal and rest break claims will involve predominately individual issues regarding the reason putative class members missed meal or rest breaks. Adjudication would essentially require mini-trials of CVS's employment practices at each store. Thus, the Court does not find that the predominance requirement is met.

## **2. Superiority**

"Rule 23(b)(3) also requires that class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" Hanlon, 150 F.3d at 1023 (quoting Fed. R. Civ. P. 23(b(3))). If each class member has to litigate numerous and substantial separate issues to establish

1 his or her right to recover individually, a class  
2 action is not 'superior.'" Zinser v. Accuflix Research  
3 Inst., Inc., 253 F.3d 1180, 1192 (9th Cir. 2001). As  
4 described above, because there is such variety in which  
5 employees have what duties, and whether putative class  
6 members were able to take meal and break periods,  
7 individual inquiries predominate. Thus, a class action  
8 is not superior to individual litigation in this case.  
9

#### 10 IV. CONCLUSION

11  
12 For the foregoing reasons, the Court DENIES  
13 Plaintiffs' Motion for Class Certification and DENIES  
14 Defendants' Ex Parte Application as moot.  
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19 Dated: October 11, 2013 —



20 Jesus G. Bernal  
21 United States District Judge  
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